FMLA
FREQUENTLY ASKED QUESTIONS
Part I

FMLA Covered Employers:

- public agencies, including State, local and Federal employers, and local education agencies (schools); and,
- private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year ¾ including joint employers and successors of covered employers.

Employee Eligibility:

To be eligible for FMLA leave, an employee must work for a covered employer and:

- have worked for that employer for at least 12 months; and
- have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and,
- work at a location where at least 50 employees are employed at the location or within 75 miles of the location; public agencies are covered without regard to the number of employee's employed.

TIME WORKED

1. **When calculating the 1,250 hours of work to determine if an employee qualifies for FMLA, are "BLT hours used" counted as well as regular hours worked?**
   No. The requirement of 1,250 hours of work within the previous 12-months is based on time actually worked. BLT hours are counted as time worked when they are earned, not when they are used.

2. **Please explain what hours count and what hours do not count toward the 1,250 hours requirement?**
   Overtime hours are counted when they are earned but they are counted on an hour-for-hour basis, even if the employee is eligible for time and one-half payment in cash or compensatory time. Union steward time is counted if it is employer-paid time for representation activities that does **NOT** come from the union's administrative leave bank. Returning military Reservists and National Guards' members, under USERRA, have their military leave counted. The months and hours they would have worked but for his or her military service, should be combined with the months employed and the hours actually worked to meet the 1,250 hours worked in the previous year.

Annual leave, personal leave, sick leave, compensatory time used, BLT used, workers' compensation, union official leave, unpaid medical leave, educational leave, and FMLA leave are not counted. Leave from the union administrative leave bank is not counted toward hours worked.

See Q11 & Q12 in the Compliance Manual

3. **Does time worked include grievance settlements where the employee is made whole?**
   The Sixth Circuit Court in Ricco v Potter, 377 Fed. 3rd. 599 (2004) declared that where an Arbitrator awards an employee reinstatement as part of a "make whole" award for an unlawful termination, an employer must give the grievant credit towards the FMLA hours-of-service requirement for hours that would have been worked. The Court did not address grievance settlements. However, using the Court's logic, a grievance settlement where the employee is made whole for a suspension or dismissal would give the employee credit towards their FMLA hours-of-service requirement for the hours the employee would have worked had the employee not been suspended or dismissed.

   See Q11 in the Compliance Manual.

STACKING TIME OF FMLA LEAVE

Although employers may select one of four options for determining the 12-month period, the State of Michigan's policy is to begin the 12-month period the first time FMLA leave is taken after the completion of any 12-month period.

4. **When an employee is stacking FMLA leave time do they still need to have worked 1,250 hours in the past 12 months?**
   Yes.

   - **Please give an example of "stacking" FMLA leave time using the state's chosen method of computation of the "twelve month period." Please include example of "non-stacking" FMLA leave time.**
     Eligible employees are entitled to a total of 12 workweeks of FMLA leave time in a 12-month period. Stacking FMLA leave time occurs when the FMLA leave entitlements from two FMLA 12-month periods run consecutively. Under the state's chosen method of calculating the FMLA 12-month period, an employee could stack FMLA leave time by taking part of their FMLA leave, which starts the clock on their 12-month period, and toward the end of the 12-month period taking the remainder of the 12 workweeks to which they are entitled in that 12-month period. Then, assuming the employee worked at least 1,250 hours in the previous 12-month period, the employee could start a new 12-month period where they would be entitled to another 12 workweeks of FMLA leave, which could be "stacked" on the FMLA leave from the previous 12-month period.

For example, an employee whose first day of FMLA leave was February 1, could be off work for 6 weeks, then come back to work and work until mid-December before taking off the remaining 6 weeks of FMLA leave. When February 1 rolled around again, a new FMLA 12-month period would begin. The employee would be entitled to a new 12 workweeks of FMLA leave beginning February 1, if they met the 1,250 hours in the previous year. This could put the employee off work for 18 consecutive weeks.

Non-stacking occurs when the FMLA leave entitlements from two FMLA 12-month periods do not run consecutively. For example an employee whose FMLA leave time was started on March 15 and was off for 12 consecutive weeks would not be entitled to any remaining time in the months before their new qualifying period that would start March 15 of the next year.

IMMEDIATE FAMILY

An employee's spouse, children (including step-children), and parents are immediate family members for purposes of FMLA. The term "parent" does not include a parent "in-law". The terms son or daughter do not include individuals age 18 or over unless theyare "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA).

5. **Are siblings considered "immediate family members"?**
   Generally no. The FMLA is very clear about who is covered as an immediate family member: spouse, parent, son or daughter. Siblings are not covered, although a sibling who stood 'in loco parentis" would qualify, or if the employee stood "in loco parentis" for the sibling. Under 29CFR825.113 persons who stood ``in loco parentis'' include "those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary."

   See also Q8 in the Compliance Manual

PROVISIONAL APPROVAL

6. **If a Permanent-Intermittent employee who has met the 12-month of employment, but is on the verge of being eligible for FMLA leave due to 1,250 hours worked, gives 30 days notice of the need for FMLA leave, should Provisional approval be given or should the employee be told to wait until they are close to their leave date before their eligibility can be determined?**

In this situation the employer would want to avoid giving a Provisional approval subject to the employee's completion of the1,250 hours. Under 29CFR825.110 (d) "…[i]f an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date that leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge [or deny] the employee's eligibility."

In this situation it is the employer's responsibility to notify the employee when they have met the hours worked to be FMLA eligible.

7. **Does the WH-381 (the CS-1790* replaces the WH-381) have a spot to designate Provisional FMLA leave approval?**
No. The US DOL WH-381***** form does not have a Provisional designation. The employer will need to write in that the approval is Provisional, and the reason it is Provisional. For example the employer may write in "waiting for medical documentation." Also, the employer must also inform the employee of the consequences to the employee if they do not satisfy the provision. For instance, the employee's final approval may be delayed or denied until the provision is satisfied.

See 29CFR825.208, e, 2, regarding preliminary designation of FMLA

*CS-1790 does include a designation of Provisional FMLA leave.

MEDICAL CERTIFICATION

8. **What needs to be included in a health care provider's statement for determination in approving an FMLA leave when the employee is using leave credits, and when the employee is not using leave credits?**
The content of the health care provider's statement serves only to determine whether an FMLA leave will be approved based upon a Serious Health Condition (SHC) of the employee or the employee's immediate family member. Once approved, the employee has the right to substitute appropriate accrued paid leave for unpaid FMLA leave. If an employee fails to designate or substitute paid leave, the employer has the right to require the employee to use appropriate approved paid leave credits. The employer also has the right to limit the use of sick leave to a sick leave qualifying purpose only.

See 29CFR825.207

9. **What form should be used for medical documentation to support an FMLA leave request?**
   All medical documentation for FMLA leave requests, including requests for extensions, should be provided on the Department of Civil Service CS1789 Certification of Health Care Provider Form.

10. **Do we accept medical documentation from a Licensed Practical Nurse (LPN) or Registered Nurse (RN) or Physician's Assistant (PA)?**
    Yes, if the medical documentation is provided on the Certification of Health Care Provider Form and the LPN, RN, or PA is licensed or trained in the field of practice that covers the employee's serious health condition.

    Under 29CFR825.118, health care providers who may provide certification of a serious health condition include:

    - doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
    - podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
    - nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice as defined under State law;
    - Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
    - any health care provider recognized by the employer or the employer's group health plan's benefits manager; and,
    - a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country;
    - any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits, including a foreign physician.

11. **Do the "medical facts" required on the Certification of Health Care Provider form CS 1789 include a formal diagnosis?**
    No. In processing an FMLA leave request, the employer is not allowed to ask for a diagnosis and one is not required. The health care provider filling out the form is certifying that, based upon the medical facts that are disclosed, the employee has a SHC. If the FMLA is running concurrently with workers compensation or long-term disability, a diagnosis may be necessary for those purposes but not for the FMLA leave itself.

    See 29CFR825.307

12. **Is a stress leave statement or psychiatric profile from a chiropractor or acupuncturist acceptable medical certification of a serious health condition?**
No. Only medical certification from a health care provider performing within the scope of their practice under State law is acceptable for establishing a serious health condition.

See 29CFR825.118

13. **Can an employee be disciplined if they do not provide the medical certification form for FMLA assuming they are using sick leave and don't care if the Employer designates the time as FMLA?**
An employee should not be disciplined for not providing medical certification.

Under 29CFR825.208, the fact that an employee does not provide the Medical Certification Form does not preclude the employer from designating such leave as FMLA as long as the employer has information from the employee, or the employee's spokesperson, that the reason for using sick leave is FMLA-qualifying and the employer has complied with the FMLA notice requirements.

If an employee refuses to provide the required Medical Certification Form, and the employer does not have such information, the employee would not have any protection under the FMLA and the employee would be subject to the provisions of their applicable collective bargaining agreement (CBA) or Civil Service Rules regarding use of sick leave and return to work.

14. **If an employee is off work for what the employer has heard is a medical condition and the employer requests medical documentation, but the employee refuses, what steps should be taken?**
If the employee is using accrued sick leave, annual leave or personal leave credits, or is on lost time, or an approved unpaid leave of absence, the employer should take the following steps under 29CFR825.208, to designate time as FMLA-qualifying and apply it toward the employee's entitlement.

- It is always the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee.

- The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave).

- In any circumstance where the employer does not have sufficient information about the reason for an employee's absence from work, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

- Once the employer has acquired knowledge that the absence from work is for an FMLA qualifying reason, the employer must, within two business days, (absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.

- If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

15. **How does the employer determine if an employee has a serious health condition as required by FMLA?**
    If the health care provider certifies the employee has a SHC as defined under 29CFR825.114 then the employer must accept that certification. If the employer questions the adequacy or validity of the medical certification, the employer may require a second opinion at the employer's expense. (See 29CFR825.307)

    If an employer becomes aware of any of the following conditions, as related to an employee, the employer may provide the employee with the CS 1789 Medical Certification Form and inform the employee that their time away from work will be counted against their FMLA entitlement. Any of the conditions outlined in section 29CFR825.114 of the FMLA Act, as a serious health condition can be charged against the employee's entitlement.

    - **Inpatient care.** Determined by an overnight stay in a hospital, hospice, or residential care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care; or

    - **Continuing treatment** by a health care provider that involves:

        - **A period of incapacity** (that is, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore for the serious health condition, or recovery from the serious health condition) **of more than three consecutive calendar days; and any subsequent treatment or period of incapacity relating to the same condition**, that also involves:

            - **Treatment two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider or by a provider of health care services (for example, a physical therapist) under order of, or on referral by, a health care provider; or
            - **One treatment session** by a physician which results in a regimen of continuing treatment by a health care provider, or at least under the supervision of the health care provider; or

- **Pregnancy.** Any period of incapacity due to pregnancy, or for prenatal care. This absence qualifies for FMLA leave even though the employee does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days; or
- **Chronic serious health condition.** Any period of incapacity, or treatment for such incapacity, due to a chronic serious health care condition. This absence qualifies for FMLA leave even though the employee or immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days.
- **Chronic serious health condition** is defined as one which:

  - Requires periodic visits for treatment by a health care provider;
  - Continues over an extended period of time; and
  - May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.); or

- **Permanent or long term condition** for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider, for example Alzheimer's Disease, a severe stroke, or the terminal stages of a disease; or
- **Multiple treatments** by a health care provider either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention such as cancer (radiation, chemotherapy, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

- **Specific Exclusions**. Routine physical, eye or dental examinations; cosmetic treatments (unless inpatient care is required and unless complications arise), the common cold, flu, ear aches, upset stomach, minor ulcers, and headaches other than migraine are excluded.

- **Specific Inclusions**. The following conditions are included in the definition of serious health condition:

  - Mental illness resulting from stress, or allergies, if the conditions of 29CFR825.114 are met; and
  - Substance abuse if the conditions of 29CFR825.114 are met. Leave may only be taken for treatment of substance abuse by a health care provider. Absence due to an employee's use of the substance does not qualify for FMLA leave.

CONTACT WITH MEDICAL PROVIDER

16. **Can Human Resources or the employee's supervisor accept phone calls from the Health Care Provider for extending a leave of absence (LOA)?**
    No. If an employee is on FMLA leave the employer is NOT allowed to have contact with the health care provider, even if the health care provider initiates the contact at the employee's request, or the employee has signed a medical release. All processing of a medical certification or extension is to be handled through the employee.

    See 29CFR825.305-307

17. **If an employee submits a return to work slip that requests accommodations within an FMLA period, can the employer contact the health care provider for further discussion or detail provided the employee has returned to the work location?**
    No. The employer is NOT allowed to have contact with the health care provider. All processing of a medical certification, including clarification, is to be handled through the employee. If the employee is requesting a reasonable accommodation under the ADA during an FMLA qualifying period the employer should provide the employee with a copy of the CS-1668, "Disability Accommodation Request by Employee" and CS Regulation 1.04.

18. **What if an employee has not physically returned yet?**
    The employer is NOT allowed to have contact with the health care provider even if the employee has not returned to work. All processing of a medical certification or extension is to be handled through the employee.

19. **What if an employee requests the employer to contact the employee's health care provider for information?**
    The employer is NOT allowed to have contact with the health care provider even if the employee requests the employer to do so. All processing of a medical certification or extension is to be handled through the employee.

20. **What if the doctor calls the employer with information or for information?**
    The employer is NOT allowed to have contact with the health care provider even if the health care provider initiates the contact. All processing of a medical certification or extension is to be handled through the employee.

21. **What if medical certification is unclear or not legible due to handwriting?**
    The employer is NOT allowed to contact the health care provider directly even if the employee gives permission or signs a release. All processing of medical certification or clarification should be handled through the employee.

22. **How would questions of possible falsification of documentation be resolved if the employer cannot communicate with health care providers?**
    If the employer has a reasonable basis to suspect falsification or validity of documentation, the employer's recourse is to send the employee for a second opinion.

    See 29CFR825.307

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